

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY DOCK,

Defendant-Appellant.

UNPUBLISHED

January 11, 2000

No. 213508

Kent Circuit Court

LC No. 97-006123-FH

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). Defendant was sentenced as an habitual offender, MCL 769.11; MSA 28.1083, to 3½ to 30 years' imprisonment. We affirm.

Defendant, twenty-seven-year-old Timothy Dock, was charged and convicted of having sexual intercourse with the fifteen-year-old complainant. Defendant admits to having sexual intercourse with complainant and it is undisputed that complainant was fifteen years old during the scope of the relationship. The complainant, however, admitted to telling defendant that she was seventeen years old. Complainant was impregnated by defendant and later bore his child.

Defendant's first issue on appeal is that complainant's intentional misrepresentations with respect to her age justify this Court considering a mistake-of-age defense in this case.

In *People v Cash*, 419 Mich 230, 246; 351 NW2d 822 (1984), our Supreme Court explicitly held that a defendant could not raise a defense of reasonable mistake-of-age against a charge of third-degree criminal sexual conduct. The Court noted that it had rejected the defense in *People v Gengels*, 218 Mich 632; 188 NW 398 (1922), under the statutory rape law that served as the precursor to MCL 750.520d; MSA 28.788(4), which was adopted in 1974. The Court held in pertinent part:

We again note that our decision is in line with the preponderant majority of jurisdictions, both state and federal, which do not recognize the reasonable-mistake-of-age defense for statutory rape offenses and have likewise upheld against due process challenges their

respective statutes' imposition of criminal liability without the necessity of proving the defendant's knowledge that the victim was below the designated age. Accordingly, we reaffirm our earlier opinion in *Gengels* and reject the reasonable-mistake-of-age defense for cases brought under Sec. 520d(1)(a) of the third-degree criminal sexual conduct statute. [*Id.*]

We are bound by *Cash, supra*. Moreover, it is not the province of the judiciary to adopt a standard that is clearly in contravention of the plain language of the statute in question. Further, while we can envision a set of facts whereby the failure to recognize the reasonable-mistake-of-age defense would appear harsh and inequitable, this is not such a case. Defendant's actions were predatory in nature and defendant's response to the complainant's pregnancy demonstrated a total lack of responsibility. Therefore, we decline to address the merits of allowing a reasonable mistake-of-age defense under the instant circumstances.

Defendant's second issue on appeal is whether the trial court erred in sentencing defendant to the highest maximum term as a third time habitual offender given that the evidence suggests that defendant might not have known that he was in fact committing a crime. We review the proportionality of a defendant's sentence for an abuse of discretion by the trial court. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant was convicted of criminal sexual conduct in the third degree, which is a felony punishable by imprisonment for not more than 15 years. MCL 750.520d(2); MSA 28.788(4)(2). However, because defendant was a third felony offender, MCL 769.11(1)(a); MSA 28.1083(1)(a) provides that defendant can be sentenced "to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term." The trial court sentenced defendant to serve $3\frac{1}{4}$ to 30 years as a third felony offender.

A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn, supra*, 635-636; *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). The habitual offender statutes, MCL 769.10 *et seq.*; MSA 28.1082 *et seq.*, provide for escalating penalties for persons repeatedly convicted of felonies. *People v Stoudemire*, 429 Mich 262, 264; 414 NW2d 693 (1987), modified *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990). The statutes are meant to deter repeat offenders through sentence augmentation but do not establish separate substantive offenses. *People v Doyle*, 451 Mich 93, 102; 545 NW2d 627 (1996).

Under the sentencing guidelines for this offense the guideline sentence range is from 72 to 120 months. Although the sentencing guidelines do not apply to habitual offenders, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Cervantes*, 448 Mich 620, 625 (Riley, J), 630 (Cavanagh, J); 532 NW2d 831 (1995), and may not be considered on appeal in determining an appropriate sentence for a habitual offender, *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996), defendant's $3\frac{1}{4}$ -year minimum falls $2\frac{1}{3}$ years below the minimum sentence guideline range.

When an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). Here, the trial court documented defendant's extensive prior criminal history, concluding that defendant has shown a "high marginal propensity toward illegal conduct, particularly as it involves itself with controlled substances." The court went on to note defendant's irresponsible and predatory actions and also noted defendant's initial total lack of responsibility when complainant became pregnant with his child.

Defendant's maximum potential sentence of thirty years is within the statutory limits for the convicted offense. The trial court sentenced defendant to a rather lenient minimum sentence and articulated valid reasons for the high-end maximum sentence. The trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael J. Kelly

/s/ Gary R. McDonald